Supreme Court, U.S.
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In The

Supreme Court of the United States

KAREN SUE CONNER, *Petitioner*,

v.

BARBOUR COUNTY BOARD OF EDUCATION; WILLIAM E. PHILLIPS; CHARLES ZINN; F. EDWARD LARRY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

KAREN SUE CONNER, *Pro Se*
P. O. Box 192
Belington, WV 26250
Phone: (304) 823-2646
Fax : (304) 823-3218

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QUESTION PRESENTED

In applying the res judicata effect of a state court ruling, a federal court should only give that ruling the preclusive effect that the highest court of that state would give it. The West Virginia Supreme Court has ruled that a final ruling on a grievance filed with the West Virginia Education and State Employees Grievance Board does not preclude a civil rights lawsuit based on the same facts as the grievance. Can a federal court rightly dismiss on the basis of res judicata and collateral estoppel a federal Title VII lawsuit because that case was based on some of the same facts that were part of a final ruling on a grievance filed with the West Virginia Education and State Employees Grievance Board?

LIST OF INTERESTED PERSONS AND Rule 29.6 NOTATION

The Parties to the proceeding below were petitioner, Karen Sue Conner and respondent Barbour County Board of Education, William E. Phillips, Charles Zinn, and F. Edward Larry.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Karen Sue Conner, respectfully asks this Court to grant certiorari to review the final judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

On December 13, 1999, the Fourth Circuit Court of Appeals denied petitioners request for Petition for En Banc Rehearing. That denial is attached as Appendix A. On October 6, 1999, the unpublished opinion of the Fourth Circuit Court of Appeals was delivered, denying petitioners request to re-instate her case.

That order is attached as Appendix B. On May 17, 1999, the Federal Northern District Court of West Virginia at Elkins, WV dismissed petitioner's federal employment discrimination claim on principles of res judicata and collateral estoppel, ruling that the case was based on facts that had been the subject of a final ruling on a petition filed with the West Virginia Education and State Employees Grievance Board. That opinion is attached as Appendix C.

JURISDICTION

The Court of Appeals entered its denial of petitioner's request for an En Banc review on December 13, 1999. This Court has jurisdiction under *28 U.S.C. Section 1254(1).*

STATUTORY PROVISION INVOLVED

United States Code

42 U.S.C. Section 2000e-2

(a) Employer practices. It shall be an unlawful employment practice for an employer--- to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3(a)

Title VII's antiretaliation provision which makes it unlawful for an employer to discriminate against any of its employees for filing complaints of discrimination.

STATEMENT

Petitioner, Karen Sue Conner, filed a grievance with the WV Education and State Employees Grievance Board in January 1995 after she was dismissed from employment by the Respondent Board of Education. Petitioner also filed a civil rights complaint with the WV Human Rights Commission and the EEOC feeling that School Laws of WV were different from civil rights laws and also after being advised in two prior grievances that the Grievance Board lacked jurisdiction. See Appendix D footnote 3. *Wright v. Universal Maritime Service Corp. et* al No. 97-889; 525 U.S. (1998)[1] The grievance board issued a decision on September 29, 1995 reinstating Petitioner to her previous job as a bus operator but allowing suspension during time of termination to decision date. The Respondents initiated judicial review by filing an appeal in the Barbour County Circuit Court on October 6, 1995 (post mark date) and then on November 8, 1995 the petitioner's association representative appealed the suspension portion only of the grievance decision since it had been placed in the Courts by the

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[1] *Wright v. Universal Maritime Service Corp.* et al No. 97-889; 525 U.S. (1998) it was observed that in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that an employee does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000 e et. Seq. If "he first pursues his grievance to final arbitration under the nondiscrimination clause of a CBA" because a grievance is designed to vindicate a "contractual right" while a law suit under Title VII asserts "independent statutory right accorded by Congress." Id., at 49-50. At Id., 51 it stated that "there can be no prospective waiver of an employee's rights under Title VII." This court held in *Wright* that "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." 460 U.S., at 708, see also *Lividas v. Bradshaw*, 512 U.S. 107, 125 (1994).

Respondent. Review of a grievance by a Circuit Court is limited to the record of the Grievance Board, and the grievance did not include civil rights claims. On April 19, 1996 the Barbour County Circuit Court reversed the Grievance Board decision allowing Respondent to dismiss the Petitioner. The Petitioner's association representative then appealed the decision of the Barbour County Circuit Court to the WV Supreme Court. This review was limited to the issues and record brought before the Grievance Board, and did not include the civil rights claims. [2] The WV Supreme Court could find no reversible error by the Barbour County Circuit Court.[3] The Petitioner had preserved and placed the civil rights issues with the WV Human Rights Commission and the EEOC.

Petitioner received a right to sue letter from the EEOC and on October 27, 1997 the petitioner filed a timely suit pro se in the Northern District Court at Elkins, WV. (Civil Action No. 2:97CV94). The initial suit on the first EEOC letter was based on sexual harassment, hostile work environment, etc. and the complaint was filed with EEOC in 1994 prior to the petitioner's dismissal from employment. A grievance was filed on these issues (Grievance No. 93-01-154) but it was dismissed in 1994 because the grievance board stated they lacked jurisdiction in these matters and the WV Human Rights Commission

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[2] *Abramson v University of Hawaii* (1979, CA9 Hawaii) 594 F2d 202, noted that discrimination claims were never litigated in the state court and reservation for a subsequent suit in federal court served to protect the policy underlying Title VII.

[3] *Wilson v. WV Bd. of Embalmers & Funeral Directors*, 168 F. Supp. 753 (S.D. W. Va. 1959) stated that when an appeal to the state courts is given as a part of the administrative remedy, it is proper to require an aggrieved party to prosecute such appeal before bringing an action in a federal court §17, p. 311. *Wiggins v. Eastern Assoc. Coal Corp.*, 357 S.E.2d 745, (1987). *Cornell v. General Elec. Plastics*, 853 F.Supp. 221 (S.D. W. Va. 1994)

issued a no probable cause ruling as a result of their investigation.[4] No hearing was ever held.

After the Petitioner obtained counsel the suit was amended on January 30, 1998 . On April 17, 1998 the EEOC issued another right to sue letter. This complaint was based on the Title VII civil rights issues of religious discrimination and retaliatory discharge relating to the Petitioner's termination from employment in January 1995. The suit was again amended to include these EEOC issues on July 13, 1998. The Petitioner is a member of the Seventh-Day Adventist religious denomination and the retaliation began in 1992 after a ruling was issued by the WV Human Rights Commission finding the Respondent guilty of discrimination and failure to accommodate the Petitioner's daughter and continued through December 1994. The original complaint with the Human Rights Commission was filed by the Petitioner on behalf of her nine year old daughter. The respondents only complied with a small portion of the order in this case.

Petitioner filed a work related request for religious accommodation in October 1992 with the grievance board, the Human Rights Commission and the EEOC. The grievance board dismissed the grievance on July 22, 1993 stating they lacked jurisdiction (Grievance No. 92-01-456). See *record, 4th circuit appeal.* On June 13, 1997 (two years after Petitioner's grievance hearing) the WV Human Rights Commission held a hearing and

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[4] *Wilfong v. Chenoweth Ford, Inc.*, 451 S.E.2d 773, (1994). While the doctrine of res judicata is applicable to the final determinations made by the W. Va. Human Rights Commission after conducting public hearing on the merits of discrimination complaint, it is not applicable to "no probable cause" determination issued by Equal Employment Opportunity Commission from having preclusive effect on subsequent action due to lack of final determination on the merits involving actual litigation, rather than just mere investigation. Also *Jones v. Glenville State College* 433 S.E.2d 49 (W.Va. 1993)

found Respondents guilty of discrimination and failure to accommodate and awarded back pay and damages. This complaint was filed in October of 1992.

The Respondent filed for dismissal of the case before the Northern District Court based on collateral estoppel and res judicata as a result of the grievance procedure. The Northern District Court at Elkins dismissed the case on May 17, 1999. The Petitioner appealed to the Fourth Circuit Court of Appeals on June 14, 1999 (Appeal No. 99-1793) and on October 6, 1999 they issued an unpublished opinion and dismissed Petitioner's complaint. On October 18, 1999 petitioner filed a petition for en banc rehearing and on December 13, 1999 the request was denied.

REASONS FOR GRANTING THE PETITION

I. In applying principles of res judicata and collateral estoppel, the federal courts below should have only given the preclusive effect to the ruling on the employee grievance that the highest court in West Virginia would have given to it.

There are essentially four requirements that must be met before collateral estoppel will apply: [5]

1] Issue decided in previous action is identical to present action. Issue is Title VII issue of 16 religious discrimination and retaliation because of complaints filed with the WV Human Rights Commission and the EEOC. The issue in the grievance involved the School Laws of WV.

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[5] *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354 C.A. 11 (Ga.) 1998; *McNealy v. Caterpillar, Inc.*, 139 F.3d 1113; C.A. 7 (Ill.) 1998. *Kelly v. Armstrong*, 141 F.3d 799; *Haley v. Retsinas*, 138 F.3d 1245; C.A. 8 (MO.) 1998.

2] Issue must have actually been litigated. The Civil rights issues were not litigated in any action and "changes in facts essential to a judgment will render (issue preclusion) inapplicable in a subsequent action raising the same issues." Collateral estoppel is applicable only when no "special circumstances (here the adequacy of state trial procedure) warranted an exception to the normal rules of preclusion.
Montana v. United States, 440 U.S. 147, 159, 99 S.Ct. 970, 59 L Ed. 2d 210 (1979) .[6] EEOC never issued right to sue letters until two years after grievance hearing in 1997/98 and therefore civil rights issues could not have been litigated.[7]

3] Issue must have been determined by valid and final judgment. Civil rights issues were not presented and the judgment never said anything about civil rights issues. Plus the West Virginia Supreme Court stated in *Vest* (Appendix D] that grievance procedures are not res judicata or collateral estoppel to Title VII complaints. The West Virginia Supreme Court of Appeals, Cleckley, J. held that:

> "Civil action filed under the West Virginia Human Rights Act is not precluded by prior grievance decided by the West Virginia Education and State Employees Grievance Board arising out of same facts and circumstances, as issues are not identical, and procedures employed by Board are

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[6] *Glover v. Narick*, 184 W. Va. 381, 400 S.E. 2d 816 (1990) held that "" fundamental due process point concerning the use of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to litigate his claim.

[7] *Conrad v. AMP, Inc.* (1979, MD NC) 21 CCH EPD ¶30479, 20 BNA FEP Cas 905, dismissal not res judicata when state action occurred 3 years prior to receipt of EEOC right to sue letter. According to the court no court, state or federal, would have had jurisdiction over plaintiff's Title VII claims at the time of the state action.

> not substantially similar to those employed by either court of law or the Human Rights Commission. Code, 5-11-1 et seq." *Vest v. Bd. of Ed. of Nicholas County*, 193 W. Va. 222, 455 S.E. 2d 781 (1995). See Appendix D.

4] Determination must have been essential to prior judgment. The determination was rendered based on the School Laws of WV and not any state or federal civil rights issues.

The principles of res judicata are a final judgment on merits; identity of cause, and identity of parties in both actions. There has never been a judgment on the merits of the Title VII complaint nor any court action, the cause is different in the two actions and the parties in the actions are different because the Title VII action names specific individuals.

The Fourth Circuit failed to recognize these facts. In two prior rulings, the grievance board had stated they lacked jurisdiction on civil rights issues. (Grievance 92-01-456 and Grievance 93-01-154). See Appendix D footnote 3.

Some circuits have found that even if the discrimination issues were presented this would not bar a trial de novo in federal court pursuant to Title VII (42 USCS 2000(e) et seq.)

The Sixth and Seventh Circuit have held that even if a state agency awarded relief to employees alleging unlawful employment practices that decision would not preclude the same employees from bringing a federal court action under Title VII of the Federal Civil Rights Act, seeking additional relief from the same practices. *Cooper v. Philip Morris, Inc.* (1972, CA6 Ky) 464 F2d

9. *Batiste v. Furnco Constr. Corp.* (CA7 Ill) 503 2d 447. (1972, DC Ill) 350 F. Supp. 10.

In *Cook v. Bd. of Ed.*, 671 F. Supp. 1110 (S.D. W. Va. 1987) the Supreme Court WV held "with the source of the law being different, and with the result being markedly different, the court cannot defer to the conclusions of law made by the hearing examiner." *Kirk v. Board of Education* (1987, CA7 Ill) 811 F2d 347, 42 BNA FEP Cas 1473, 42 CCH EPD p. 36787.

28 USCA § 1738 does not allow federal courts to employ own rules of res judicata in determining effect of state judgments; rather it goes beyond common law and commands federal court to accept rules chosen by state from which judgment is taken. *National R. Passenger Corp. v. Pennsylvania Public Utility Com.* (1987, ED Pa) 665 F Supp 402, affd (CA3 Pa) 848 F2d 436, cert den (US) 102 L Ed 2d 220, 109 S. Ct. 231. *Gutierrez v.* Lynch (1987, CA6 Ohio) 826 F2d 1534. *E. D. Systems Corp. v. Southwestern Bell Tel. Co.* (1982, CA5 TX) 674 F2d 453. *Steph v. Scott* (1988, CA5 TX) 840 F3d 267, p. 4(b). *Eisfelder v. Dept. of Natural Resources* (1993, WD Mich) 847 F. Supp. 78, 3 ADD 1057, 3 AD Cas 933. *Rutledge v. Arizona Bd. of Regents* (1988, CA9 Ariz) 859 F2d 732. *Henry v. Farmer City State Bank* (1986, CA7 Ill) 808 F2d 1228, 6 FR Serv 3d 971.

42 USCS 1983, State law controls extent to which state proceeding estops subsequent federal action. *Gregory v. Chehi* (1987, ED Pa) 654 F. Supp. 670; (CA3 Pa) 843 F2d 111.

The *U.S. Supreme Court in 1979* emphasized the need for "a full opportunity to be heard is an essential element of res judicata i.e., the risk of unfairness must be overcome if claim preclusion

and cause of action preclusion is to be allowed. Where the opportunity to litigate was not complete and unfettered, the court should not grant preclusion because fundamental unfairness is existent." The following have rejected doctrines of collateral estoppel and res judicata as bars to litigation in federal courts even where there has been prior state agency adjudication related to same or similar charges. *EEOC v. Peterson, Howell & Heather, Inc.* (1989, DC Md) 702 F. Supp. 1213, 48 BNA FEP Cas 1185, 49 CCH EPD pp. 38684. *Garner v. Giarrusso* (CA5 La) 571 F2d 1330, 20 BNA FEP Cas 1314, 16 CCH EPD p. 8274, reh den (CA5 La), 575 F2d 300. *Cummins v. Parker Seal Co.* (CA6 Ky) 516 F2d 544, Affd 429 US 65, 50 L Ed 2d 223, 97 S. Ct. 342. *Hayes v. Solomon*, 597 F2d 958, 982-85 (5th Cir. 1979) *Unger v. Consolidated Foods Corp.* (1981 CA 7 Ill) 657 F2d 909, 26 BNA FEP Cas 1025, 26 CCH EPD p. 32042. *Cooper v. Philip Morris, Inc.* (1972, CA6 KY) 464 F2d 9.

Where plaintiff decided to prosecute complaint of sex discrimination and consequent wrongful termination from employment at state administrative level with subsequent state judicial review, neither doctrine of election of remedies nor doctrines of res judicata and collateral estoppel foreclosed plaintiff from subsequently pursuing her right to seek trial de novo in federal court pursuant to Title VII . *42 USCS § 2000e et seq. Unger v. Consolidated Foods Corp.* (1981, CA7 Ill) 657 F2d 909, 26 BNA FEP Cas 1025, 26 CCH EPD p. 32042 *(U.S. Supreme Court.)*

Most courts of appeals have cited *Alexander v. Gardner-Denver* and the federal courts "final responsibility" in support of the rule that title VII complainants are entitled to a de novo opportunity to present their cases in federal courts irrespective of the nature of the prior state proceedings. Arbitral fact-finding processes, the Court observed, are not

commensurate with judicial processes, the record is not as complete, the usual rules of evidence do not apply and civil trial procedures such as discovery, compulsory process cross-examination, and testimony under oath are often severely limited or unavailable.

Other courts have held that in addition to the other elements collateral estoppel "there must be a showing that the policies and goals underlying the matter at issue are the same in both proceedings." *Bortz v. Workers Comp. Appeal Board* 656 A2d at 559. All of the basic rules must be satisfied before they will act to deny a person of their rights.

II. In the *Vest* case, the West Virginia Supreme Court decided that final rulings on claims brought through the WV Education and State Employees Grievance Board process would not preclude later civil rights actions based on the same claims.

Finally an important question is whether the Petitioner had a full and fair opportunity to present her case. Obviously she did not. *Vest* states that the grievance procedure in WV does not afford this opportunity. Syllabus 3 states "A civil action filed under the West Virginia Human Rights Act, *W. Va. Code, 5-11-1, et seq.*, is not precluded by a prior grievance decided by the West Virginia Education and State Employees Grievance Board arising out of the same facts and circumstances " Appendix D.

Both *Vest* and the Petitioner were employed by a Bd. of Ed. in West Virginia, both filed a level IV grievance and had a grievance hearing after they were terminated from their employment. *Vest* however did present evidence in support of her discrimination claim but in her post hearing brief,

she relinquished her claim upon her belief that it was not the proper forum to hear her discrimination claim whereas the Petitioner did not present evidence because the discrimination claim was already placed with the WV Human Rights Commission and the EEOC and she felt this was where it belonged. The grievance board denied Vests grievance and *Vest* appealed to the Circuit Court of Kanawha County who affirmed the level IV decision and the WV Supreme Court refused to hear her appeal. Whereas the grievance board reinstated the Petitioner to her job but permitted a suspension to take place during the time of the decision making process. The Respondents initiated the appeal to the Barbour County Circuit Court and thirty days later the Petitioner's representative appealed the suspension portion of the decision only and the Circuit Court reversed the suspension and allowed her to be terminated and the Supreme Court granted her appeal. *Vest* filed a complaint with EEOC after her grievance hearing and the Petitioner filed her complaint with the WV Human Rights Commission and the EEOC prior to her grievance hearing and preserved the EEOC discrimination issues.

In both cases the Board of Education filed a motion for summary judgment with the district court arguing the discrimination claim was barred by the doctrines of res judicata and collateral estoppel because of the plaintiff's previous hearing before the Grievance Board. The Southern District Court turned to the WV Supreme Court for guidance and an opinion on the issue. The Northern District Court ignored the WV Supreme Courts opinion. The fact that the WV Supreme Court chose to hear the Petitioner's case does not make it any different from the *Vest* case and adds little when the same court states the grievance procedure does not allow a full and fair opportunity to be heard and which does not preclude a civil action filed under the

WV Human Rights Act. [2] See Appendix D for full opinion.

In *State ex re. White v. Parsons*, 483 S.E. 3d1 (W. Va. 1996) Michies 1998 Supp., p. 19, Administrative Law the West Virginia Supreme Court stated that "any administrative agency is limited by principles of fundamental fairness." Grievances, according to W. Va.Code, 18-29-2 (1992), may include claims by employees alleging "discrimination" in the application or interpretation of written rules or procedures, "discrimination" in the "application of unwritten policies or practices of the board, [and] any specifically identified incident of harassment, or favoritism[.] This Code also defines the following terms for purposes of article twenty-nine:

"(m) 'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." The word discrimination does not refer to Title VII Civil Rights issues but to the Code as outlined in the above grievance procedure.

A trial by jury is guaranteed by the *Constitution of the United States* and there is never the opportunity or a choice of a trial by jury at any stage of the grievance procedure. Many courts have held that Title VII issues are for jury determination.[8] 12 ALR 5th 508. U.S.C.A. Const.

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[8] *West v. Gibson*, No. 98-238; 527 U.S. ___decided 6/14/99. § 2000e—16[c] "to empower courts to entertain an action by a complainant still aggrieved after final agency action." In 1991, Congress again amended Title VII in the Compensatory Damages Amendment (CDA), which among other things, permits victims of intentional discrimination to recover compensatory damages "[I]n an action...under [§ 2000e—16]." §

Amend. 7 [9] Vest states clearly and simply that res judicata and collateral estoppel does not apply to grievance board decisions in the State of West Virginia. (See Appendix D for full case.)

II. The Fourth Circuit's refusal to follow *Vest* conflicts with the approach to issues of res judicata and collateral estoppel followed in a number of other circuits.

Federal rules regarding collateral estoppel and res judicata have always looked back to the States rules and applied the states rules in these matters. The WV Supreme Court issued its opinion in *Vest* and its principles have been applied in other cases[10] as well. *Vest* states clearly and simply that res judicata and collateral estoppel does not apply to grievance board decisions in the State of West Virginia.(See Appendix D for complete case.) This ruling is in line with ruling that an appealed determination of state human rights commission dismissing charge of employment discrimination does not bar by res judicata plaintiff from bringing

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1981a (a)(1), and adds that any party in such an action may demand a jury trial, § 1981a(c).

[9] *Palermo v. Tension Envelope Corp.* 959 S.W. 2d 825, 13 I.E.R. Cas. (BNA) 1275 (Mo. Ct. App. E.D. 1997), reh'g and/or transfer denied, (Jan. 8, 1998) and transfer denied, (Feb. 24, 1998) stated that "if facts are in dispute as to whether employer's conduct toward employee is discriminatory, question is one for jury for purposes of statute prohibiting employer from discriminating against employee in retaliation for exercising rights under workers compensation law. "

[10] *Asaad v. Res-Care, Inc.*, 197 W.Va. 684, 478 S.E. 2d 357(1996); *Harrison County Bd. of Ed. v. Carson-Leggett*, 466 S.E.2d 447, (1995), not barred by doctrine of res judicata or collateral estoppel from pursuing discrimination claims

subsequent Title VII action in federal court for employment discrimination. *Parker v. Danville Metal Stamping Co.* (1985, CD Ill) 603 F. Supp 182, 37 BNA FEP Cas 250. *Jones v. Glenville State College* 433 S.E.2d 49 (W.Va. 1993)

Some circuits have found that even if the discrimination issues were presented this would not bar a trial de novo in federal court pursuant to Title VII (42 USCS 2000(e) et seq.)[11]

Even if it were considered a court the Federal Court when asked to give res judicata effect to state court judgment must apply res judicata principles of law of the state (here W.Va.) whose decision is set up as bar to further litigation. *Hernandez v.* Lafayette (1983, CA5 La) 699 F2d 734; *Gregory v. Drury* (1987, CA5 Tex) 809 F2d 249; *Henry v. Farmer City State Bank* (1986, CA7 Ill) 808 F2d 1228, 6 FR Serv 3d; *Eisfelder v. Dept. of Natural* Resources (1993, WD Mich) 847 F Supp 78, 3 ADD 1057, 3 AD Cas 933; *United States v Jones* (1993, SD Ala) 837 F Supp 1145.

The Fourth Circuit decision in this case has caused a division of authority and opinion between the Northern District Court of WV in Elkins and Southern District Court of WV who requested that the WV Supreme Court issue a ruling in *Vest* and then adopted the State Court's ruling.

Appellate courts have cited strong Congressional policy that plaintiff not be deprived of right to resort to federal court for

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[11] *Unger v. Consolidated Foods Corp.* (1981 CA 7 Ill) 657 F2d 909, 26 BNA FEP Cas 1025, 26 CCH EPD p. 32042. *Cooper v. Philip Morris, Inc.* (1972, CA6 KY) 464 F2d 9. *Hayes v. Solomon*, 597 F.2d 958, 98285 (5th Cir. 1979)

adjudication of federal claims under Title VII. Some courts have even gone so far to state that Title VII is strictly an issue to be decided by the Federal Courts. The grievance procedure in WV does not allow for any recovery for intentional infliction of emotional and physical distress.[12]

In 1979 the U. S. Supreme Court in *Parklane Hosiery Co. v. Shore*, emphasized the need for a "full opportunity to be heard is an essential element of res judicata, i.e., the risk of unfairness must be overcome if claim preclusion or cause of action preclusion is to be allowed. Where the opportunity to litigate was not complete and unfettered, the court should not grant preclusion because fundamental unfairness is existent."

The U. S. Supreme Court opined that allowing preclusion may be "unfair to a defendant if the judgment relied upon as a basis for the preclusion is itself inconsistent with one or more previous judgments in favor of the defendant." In the instant case the Administrative Law Judge found fault on the part of the Board of Education as a contributing factor and that Petitioner acted in a manner consistent with other employees actions in similar circumstances which of itself indicates disparate treatment towards the Petitioner. *Level IV Grievance Board Decision*

"Preclusion under res judicata or collateral estoppel is overridden if the principle would preclude a federal court, as a consequence of a prior state

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[12] *Mullis v. Mechanics & Farmers Bank*, 994 F. Supp. 680 (M.D.N.C. 1997); *Albert v. National Cash Register Co.* (1995, SD Fla) 874 F. Supp 1328 ; *Taylor v. Metzger*, 152 N.J. 490, 706 A.2d 685, 76 Fair Empl. Prac. Cas. (BNA) 58, 72 Empl. Prac. Dec. (CCH)¶45231 (1998)

court judgment, from adjudicating a claim, defense, claim, defense, facts, or issues implicating federal law."

Rules of Decision Act, *28 USCS 1652*, require Federal Courts to give prior state judgment same res judicata effect as would be provided by courts of that state. *Al-Khazaji v. St. Francis* College (1986 CA2PA) 784 F3d, 505. *44 USCA § 1983*, state law controls extent to which state proceeding estops subsequent federal action; *Gregory v. Chehi* (1987, ED Pa) 654 F Supp. 670; (CA3 Pa 843 F2d 111.) The full faith and credit statute does not permit federal courts to employ own rules of res judicata in determining effects of state judgments; rather, federal court is to accept rules chosen by state in which judgment is rendered. *MGA, Inc. v. General Motors Corp.* (1987, CA FC) 88827 F2d 729, 3 USPQ2d 1762.

In a sex discrimination suit pursuant to *42 U.S.C.A. § 2000e* et seq., in which a female plaintiff alleged that persistent harassment in her job resulted in her unlawful termination of employment, the court held, in *Beck v Mather* (1976, WD Va) 417 F Supp 648, that plaintiff's unsuccessful breach of contract suit in a state court was not res judicata as to claims under *Title VII of the Civil Rights Act of 1964* in federal court. It is well settled, said the court, that a prior state court determination is not res judicata as to Title VII claims, and that a federal court is not bound by the state court's findings of fact [1]

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[13] *West. Secretary of Veterans Affairs v. Gibson*, No. 98-238, (*West v. Gibson* 527 U.S. ___6/14/99. §2000e—16 [c] "to empower courts to entertain an action by a complainant still aggrieved after final agency action." In 1991, Congress again amended Title VII in the Compensatory Damages Amendment (CDA), which among other things, permits victims of intentional discrimination to recover compensatory damages "[i]n an action...under [§2000e—16]," §1981a(a)(1), and adds that any party in such an action may demand a jury trial, §1981a(c).

A recent ruling C.A.D.C. 1998 stated that for administrative determination to have issue-preclusive effect in later judicial proceeding it not only satisfy ordinary requirements of collateral estoppel but must also result from process sufficiently similar to judicial proceeding. Restatement (Second) of Judgments § 83. *Sea-Land Service, Inc. v. Department of Transportation*, 137 F.3d 640, 329 U.S. App. D. C. 108. Also, M.D. Ala. 1998. *See Vest*, Appendix D, grievance board is not similar to court.

Determinations on employment discrimination claims made pursuant to administrative proceedings or contractual grievance processes are not given any preclusive effect, under doctrines like res judicata, in future suits to redress rights under Title VII or § 1981. *42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.*[13] *Smith v. State of Alabama*, 996 F. Supp. 1203. *Stuhlreyer v. Armco, Inc.* (1992, SD Ohio) 849 F. Supp 583, affd (CA6 Ohio) 12 F3d 75. *Civil Rights Act of 1991, §2, 105 Stat. 1071, 42 U.S.C. §1981 note* (congressional finding that "additional remedies under Federal law are needed to deter intentional discrimination in the work- place").

Also recognizing that state law controls applicability of res judicata or collateral estoppel in nondiversity action where prior judgment involved issues of state law are the U. S. Supreme Court; First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. *Fleming v. Universal-Rundle Corp.*, 142 F.3d 1354 (C.A. 11(Ga.) 1998; *McNealy v. Caterpillar, Inc.*, 139 F. 3d 1113 (C.A. 7 (Ill.) 1998; *Kelly v. Armstrong*, 141 F.3d 799; (C.A. 8 Neb.) 1998; *Haley v. Retsinas*, 138 F. 3d 1245

(C.A. 8 Mo.) 1998; *Settle v. S.W. Rodgers, Co., Inc.*, 998 F. Supp. 657 (E.D.Va. 1998); *Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219 (C.A.4 S.C.) 1998; *Dodd v. Hood River County*, 136 F. 3d 1219, (C.A.9 Or.) 1998; *Thoele v. U.S. Postal Service*, 996 F.Supp. 818 (N.D.Ill. 1998); *Allenfield Associates v. U.S.*, 40 Fed. Cl. 471 1998.

Because of the difficulty of securing appellate review, trial courts will only rarely obtain guidance from the federal courts of appeals on this issue, and the opportunities for this Court to review the issue will be few. This case presents a rare opportunity to assure that an injustice does not occur and that laws of collateral estoppel and res judicata are applied equally.

The decision below, Appendix C, conflicts with other districts within the Fourth Circuit, with other Circuits, with Congressional intent, [7] with the purpose of Title VII to curb discrimination and frustrates the public policy interest against discrimination as set forth in *Brantly v. Pisaro (1996)* 42 California Appeal 4th, *1591, 1601*, with the Constitution and federal policy to see that all persons are accorded access to the courts and have a full and fair opportunity to present their cases to a jury. When you consider that the respondents were found guilty of religious discrimination twice since 1992 plus they were found guilty of reprisal twice under the school laws of West Virginia by the grievance board by two separate hearing - examiners against the Petitioner since 1992 then you find reasonable cause to assume their actions were intentional based on the fact that they had been made aware of their illegal actions in 1992 and they subsequently showed a disregard for the Civil Rights Laws by

doing the same thing again and against the advice of the prosecuting attorney.

The Fourth Circuits decision represents a Federalistic attitude, is against Congressional intent to curb discrimination, against public policy and purpose of Title VII, shows a disregard for the rights of the State of West Virginia, shows a disregard for opinion of the W. Va. Supreme Court in *Vest*, as well as the rights of the Petitioner to have her case heard by the court and causes a division within its own circuit and between the circuits.

The Court should grant certiorari to review these important conflicts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Karen Sue Conner, *Petitioner*
Pro Se
P. O. Box 192
Belington, WV 26250
Phone: (304) 823-2646

May 4, 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 13, 1999

No. 99-1793
CA-97-94-2

KAREN SUE CONNER
Plaintiff - Appellant

v.

BARBOUR COUNTY BOARD OF EDUCATION;
WILLIAM E. PHILLIPS; CHARLES ZINN;
F. EDWARD LARRY
Defendants - Appellees

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX B

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1793

KAREN SUE CONNER,
Plaintiff-Appellant
versus

BARBOUR COUNTY BOARD OF EDUCATION;
WILLIAM E. PHILLIPS; CHARLES ZINN;
F. EDWARD LARRY,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Robert Earl Maxwell, Senior District Judge. (CA-97-94-2)

Submitted: September 30, 1999
Decided: October 6, 1999
Before NIEMEYER, WILLIAMS, and MICHAEL, Circuit Judges

Affirmed by unpublished per curiam opinion.

Karen Sue Conner, Appellant Pro Se. Richard Michael Yurko, Jr., STEPTOE & JOHNSON, Clarksburg, West Virginia; Rodney Lloyd Bean, STEPTOE & JOHNSON, Morgantown, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.
See Local Rule 36 (c)

PER CURIAM:

Karen Sue Conner appeals the district court's order dismissing her Title VII complaint. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district. court. See Conner v. Barbour County Board of Educ., No. CA-97-94-2 (N.D. W. Va. May 17, 1999). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

Filed May 17, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT ELKINS

KAREN SUE CONNER,

Plaintiff,

v. **CIVIL ACTION NO.:2:97CV94**

BARBOUR COUNTY BOARD OF EDUCATION, et al.,

Defendants.

DISMISSAL ORDER

On October 27, 1997, Plaintiff Karen Sue Conner filed her Complaint in this case, *pro se*, alleging harassment and unfair treatment during her tenure as a bus driver employed by the Barbour County Board of Education, and seeking $2 million in compensatory damages and other non-economic relief. Defendants filed a timely Answer to the Complaint in which they denied liability on any of Plaintiff's claims and affirmatively asserted that Plaintiff's action was barred by the applicable statute of limitations and by the doctrines of estoppel and assumption of risk.

Plaintiff later retained counsel and amended her Complaint with leave of Court. In her Amended Complaint, Plaintiff alleged, in three counts, that (1) Defendants failed to reasonably accommodate Plaintiff's religious preferences; (2) Defendants sexually harassed Plaintiff; and (3) Defendants discharged Plaintiff in retaliation for Plaintiff's request for religious accommodation and because

Plaintiff has filed grievances against the defendants. In her Amended Complaint, Plaintiff prayed for $100,000 in compensatory damages on each of the three counts asserted, as well as punitive damages. In response to the Amended Complaint, Defendants denied any liability to Plaintiff and affirmatively asserted the defenses that the action was barred by the statute of limitations, by the doctrines of res judicata, collateral estoppel and immunity, and by Plaintiff's failure to exhaust administrative remedies.

After two unsuccessful attempts at mediation of the case, the parties informed the Court, by counsel, that the case involved certain legal issues which presented impediments to its amicable resolution. The Court ordered that the parties brief these legal issues so that they could be resolved by the Court. In accordance with the Court's briefing order, Defendants filed a "Memorandum On Legal Issues To Be Resolved By The Court" and Plaintiff thereafter filed a "Reply To Defendants' Memorandum On Legal Issues To Be Resolved By The Court." At a hearing held April 14, 1999, the Court heard argument on these outstanding legal issues. Plaintiff appeared at the hearing by her counsel, J. Lawrence Hajduk, and Defendants appeared by their counsel, Richard M. Yurko, Jr. and Rodney L. Bean.

Having carefully considered the parties briefs and the argument of counsel, the Court makes the following findings of fact and conclusions of law:

Findings Of Fact [1]

1. Plaintiff was employed by the Barbour County Board of Education ("the Board") as a school bus operator from 1978 until 1995. For seven years, from 1985 until 1992, Plaintiff was certified and employed as an instructor of bus operators. As an instructor of bus operators, Plaintiff was provided with instructional programs dealing with accidents and emergencies.

2. During her years of employment with the Board, Plaintiff was suspended for two days in 1980 for fighting, suspended for another four days in 1985 for striking her immediate supervisor, and began the 1994-1995 school year under a 30 day suspension without pay due to yet another confrontation with her immediate supervisor at the end of the 1993-1994 school year, in which her insubordination included calling her immediate supervisor a "dirty bastard" in the presence of another employee.

3. On December 12, 1994, Plaintiff was transporting 46 elementary, middle school, and high school children home on her evening route when she collided with another vehicle on a one-lane bridge. The road on which the accident occurred was narrow with steep banks on each side and dangerous to walk along.

4. Immediately after the accident and without making any attempt to call for back up transportation, Plaintiff opened the bus door and left it open for students to freely exit the bus. Students of all ages exited the bus. Some students left the scene by catching rides with parents, relatives,

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[1] The Court's Findings Of Fact are adopted largely from the decision of the Supreme Court of Appeals of West Virginia in Karen Sue Conner v. Barbour County Board of Education, 200 W. Va. 405, 489 S.E.2d 787 (1997).

friends, neighbors or boyfriends. Plaintiff also allowed 14 students to ride home in a minivan. Two sisters, ages approximately 8 and 11, attempted to walk to their home eight miles away without Plaintiff's knowledge and were picked up by the Superintendent (Defendant Phillips) and Transportation Director (Defendant Zinn) approximately one-half to three-fourths of a mile from the bus. By the time the Superintendent and the Transportation Director arrived only 30 minutes or so after the accident, just four of the older students remained at the scene.

5. After the accident, without checking on each child for injuries, Plaintiff signed a release form for the Emergency Medical Squad indicating that no one was injured, although at least one student bumped her head and missed the next day of school as a result. Plaintiff also failed to place reflective triangles on the road to caution other drivers. Furthermore, Plaintiff was unable to accurately recall which students were on the bus at the time of the accident and how the students got home.

6. Superintendent Phillips recommended to the Board that Plaintiff be dismissed from employment based on her conduct, specifically: failure to locate warning devices; failure to properly notify school officials; failure to request back up transportation; failure to secure proper releases from students regarding their physical condition; and permitting various students to exit the bus and leave the scene without knowledge of their destination and with whom they left. In summary, the Superintendent found that Plaintiff failed to maintain control of the students in accordance with the appropriate rules and regulations. The Superintendent considered recommending discipline of less than termination, but because of the serious concern of the safety of the children, the complaints of parents over the

handling of students following the accident, the serious nature of Plaintiff's conduct and her failure to follow emergency regulations of which she was aware due to her training and prior employment as a Bus Operator and Bus Driver Instructor, the Superintendent found dismissal to be warranted.

7. At a hearing of the Barbour County Board of Education on January 17, 1995, at which Plaintiff appeared in person and by counsel, Plaintiff testified that she did not realize that she did anything wrong. The Board concluded that her employment should be terminated based on her conduct, particularly because Plaintiff placed the safety of the students in grave danger, and she was discharged on January 23, 1995.

8. Plaintiff grieved her discharged, and hearings were conducted before an Administrative Law Judge with the West Virginia Education and State Employees Grievance Board ("ALJ"). By order entered September 29, 1995, the ALJ found that the Board had proven Plaintiff's failure to maintain proper control over the students and that Plaintiff had permitted the students to go home with persons other than their parents, without permission slips and at a spot other than their designated bus stop. [2] The ALJ, however, reduced the penalty from discharge to suspension without pay from January 23, 1995 through September 30, 1995.

9. Both Plaintiff and the Board appealed to the Circuit Court of Barbour County, West Virginia. By order entered April 19, 1996, Judge Waters affirmed the ALJ's findings of fact but reversed the determination regarding suspension. Instead,

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[2] The Administrative Law Judge's precise finding was that Plaintiff "did not have control of the children as they freely exited the bus and milled around outside the bus. This lack of control compromised the safety of the students, particularly those of elementary age."

Judge Waters upheld the Board's original discharge decision.

10. Plaintiff then appealed to the West Virginia Supreme Court of Appeals. In her appeal, Plaintiff alleged that the Board did not prove its assertion that Plaintiff failed to maintain proper control of the students. Plaintiff also argued that the discharge was an excessive penalty; that the discharge was retaliatory; and that Plaintiff was entitled to an improvement period. In its decision, the West Virginia Supreme Court of Appeals found no merit to any of Plaintiff's allegations and affirmed the Circuit Court's decision.

Conclusions Of Law

1. Because this Court's jurisdiction of this case is based on its alleged presentation of a federal question, Am. Compl. ¶7; see 28 U.S.C. § 1331, the Court must apply federal law rather than state law in resolving the issues the case presents. *See generally* Erie Railroad Co. v. Thompkins, 304 U. S. 64 (1938). The extent to which a federal court must attach preclusive effect to a prior state court proceeding is a federal question controlled by Erie and its progeny, as well as 28 U.S.C. § 1738. Adam v. Saenger, 303 U.S. 59, 64 (1938); American Mannex Corp. v. Rozands, 462 F.2d 688 (5th Cir. 1972); Haislip v. Riggs, 534 F. Supp. 95, 99 (W.D.N.C. 1981).

2. In 28 U.S.C. § 1738, Congress directed that judicial proceedings of a court of any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Where a valid final decision has been adjudged against the Plaintiff in a state court having jurisdiction over the persons and the

cause of action, the doctrine of *res judicata* has been held to bar relitigation by the Plaintiff against the same person in a federal court of that state. Cobb v. Clark, 257 F.Supp. 175 (M.D.N.C. 1966), *aff'd*, 375 F.2d 773 (4th Cir. 1967); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); *Haislip*, 534 F. Supp. at 99.

3. In 28 U.S.C. § 1738, Congress directed that judicial proceedings of a court of any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Where a valid final decision has been adjudged against the Plaintiff in a state court having jurisdiction over the persons and the cause of action, the doctrine of *res judicata* has been held to bar relitigation by the Plaintiff against the same person in a federal court of that state. Cobb v. Clark, 257 F.Supp. 175 (M.D.N.C. 1966), *aff'd*, 375 F.2d 773 (4th Cir. 1967); Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); Haislip, 534 F. Supp. at 99.

4. The requirements for invoking the doctrine of *res judicata* to preclude a subsequent lawsuit by bar or claim preclusion are familiar one. "As applied, the essential elements of the doctrine are generally stated to be (1) a final judgment on the merits in an earlier suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of the parties or their privies in the two suits." Keith v. Aldridge, 900 F.2d 736, 739 (4th Cir. 1990)(quoting Nash City Board of Education v. Biltmore Co., 640 F.2d 484, 486 (4th Cir. 1981)).

5. Our Court of Appeals has broadly applied the doctrine of *res judicata* to preclude claims in a second action. In Aliff v. Joy Manufacturing Co., 914 F.2d 39, 43 (4th Cir. 1990), the court found two causes of action were "sufficiently the same when the second claim 'arises out of the same transaction or series of transactions as the claim resolved the prior judgment.' " The Court held that "'[R]*es judicata* precludes litigation by the Plaintiff in a subsequent action of claims with respect to all or any part of the transaction, or series of connected transactions, out of which the first action arose.' " Id. (quoting Harnett v. Billman, 800 F.2d 1308, 1313 (4th Cir. 1986)); *accord*, Aldridge, 900 F.2d at 740.

6. Similar to the doctrine of *res judicata* is the doctrine of collateral estoppel, also known as issue preclusion. The primary difference between *res judicata* and collateral estoppel is that while the former focuses on the precise cause of action adjudicated in the prior proceeding, the latter focuses on the issues which were litigated in the prior proceeding without regard to the cause of action involved. The United States Supreme Court has defined collateral estoppel as simply meaning "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any lawsuit. Ashe v. Swenson, 397 U.S. 436, 443 (1970). The Fourth Circuit has held that "[c]ollateral estoppel or issue preclusion forecloses 'the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [collateral estoppel] is asserted had a full and fair opportunity to litigate.' " Ramsay v. U.S.I.N.S., 14 F.3d 206, 210 (4th Cir. 1994) (quoting Virginia Hosp. Ass'n v. Baliles, 830 F.2d 1308, 1311 (4th Cir. 1987)].

7. In this Circuit, a party asserting collateral estoppel must establish the following elements: (1) that the issue precluded is identical to one previously litigated; (2) that the issue was actually determined in the prior proceeding; (3) that determination of the issue was a critical and necessary part of the decision in the prior proceeding; (4) that the prior judgment was final and valid; and (5) that the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. Ramsay. 14 F.3d at 210

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8. The law is clear in the Fourth Circuit that an administrative proceeding can be the basis for invoking the doctrines of *res judicata* and collateral estoppel. *E.g.* United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966); North Carolina v. Chas. Pfizer & Co., 537 F.2d 67 (4th Cir.), *cert denied*, 429 U.S. 870 (1976); Harrah v. Richardson, 446 F.2d1 (4th Cir. 1971); Moore v. Allied Chemical Corp. 480 F. Supp. 377 (E.D. Va. 1979). The key factor in determining when an administrative action can constitute *res* judicata or collateral estoppel is whether the agency involved "is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties....had adequate opportunity to litigate...(in that) both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings." Utah Construction, 384 U.S. at 422; Moore, 480 F. Supp. At 383.

9. In light of these principles, it is beyond dispute that Plaintiff's cause of action for retaliatory discharge is barred. Plaintiff raised the identical cause of action during her grievance proceeding

The ALJ concluded that Plaintiff made a prima facie case for retaliation based upon the fact that she had filed 14 grievances during her tenure, but found that the Board had rebutted her prima facie showing "by offering evidence of a legitimate, non-discriminatory reason for the adverse action, that is a concern for the safety of the children. (Plaintiff) failed to prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." (Conner, 489 S.E. 2d at 791).

10. This particular holding was later affirmed by the Circuit Court of Barbour County. On appeal by the Plaintiff, the Supreme Court of Appeals of West Virginia analyzed de novo the ALJ's conclusions of law and application of law to the facts (Conner, 489 S.E.2d at 790), and affirmed the ALJ's decision denying the portion of Plaintiff's grievance claiming retaliatory discharge (Conner, 489 S.E.2d at 790-91). Citing Frank's Shoe Store v. West Virginia Human Rights Comm'n, 365 S.E.2d 251 (W.Va. 1986), the court outlined the elements of a claim for a prima facie case of unlawful retaliatory discharge under the West Virginia Human Rights Act (Conner, 489 S.E. 2d at 791 (quoting Mace v. Pizza Hut, Inc., 377 S.E. 2d 461, 464 (W. Va. 1988)). The court agreed with the ALJ that "(u)pon the presentation of that legitimate, non-retaliatory motive (involving the safety of the children entrusted to Plaintiff's care), the (Plaintiff) failed to demonstrate that the reasons offered for her discharge were merely a pretext for retaliatory motive." (Conner, 489 S.E.2d at 790-91).

11. The parties to the state action and this Federal action are the same. [3] In both the state action and in this federal action, the ultimate dispositive factual issue is identical: Was Plaintiff's discharge the result of unlawful retaliation by the Board? That issue was specifically and repeatedly resolved against the Plaintiff during the state grievance proceeding, the appeal of the ALJ's decision to the Circuit Court of Barbour County, and the appeal of the Circuit Court's decision to the West Virginia Supreme Court of Appeals. Such resolution of the issue in a court of competent jurisdiction in an action begun by the Plaintiff precludes the subsequent relitigation of that issue in any action between the same parties, whether in a state or federal court. Bound under *res judicata* and collateral estoppel principles by the adverse decision of the West Virginia Supreme Court of Appeals on the dispositive factual issue whether there had been unlawful retaliation in the Board" decision to terminate Plaintiff' employment, there is no factual basis on which the Plaintiff might prevail in her Title VII action.

12. Our Court of Appeals has upheld a district court's application of *res judicata* and collateral estoppel principles in a case much like this one. In Moosavi v. Fairfax County Board of Education, 666

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[3] That Plaintiff has added as additional parties Defendant in this action Barbour County's superintendent of schools, director of transportation, and Plaintiff's immediate supervisor is of no moment. Plaintiff has named those parties in their official capacities, having alleged no conduct outside the scope of their employment. These parties therefore are in privity with the Board in this matter. Moreover, because the case before this Court is based on the same facts and allegations as Plaintiff's state action, Plaintiff could have named these additional Defendants in her state action, but simply failed to do so.

F.2d 58(4th Cir. 1981), the court held that a Plaintiff was collaterally estopped from litigating his claim under Title VII that he had been discriminatorily denied permanent employment because of his national origin where that same action had been resolved against Plaintiff after a full hearing and trial in a state court action seeking injunctive relief and monetary damages. Id. At 59. The district court had held that the issue of whether discrimination had occurred could not be relitigated because of the prior state court judgment resolving that ultimate issue. Id.

13. Plaintiff's state action meets our Court of Appeals' requirements for application of the doctrine of res judicata. The West Virginia Supreme Court of Appeals' decision is indisputably a final judgment on the merits in an earlier suit. There is no doubt that Plaintiff asserted her cause of action for retaliatory discharge in both the state action, and in this one. Finally, the parties or their privies are identical in the state action and in the action before this Court.

14. Likewise, Plaintiff's state action meets the Fourth Circuit's requirements for application of the doctrine of collateral estoppel. The issue precluded (whether Plaintiff's discharge resulted from unlawful retaliation) is identical to the issue previously litigated in Plaintiff's state action. The issue was definitively determined in the prior proceeding when the West Virginia Supreme Court held that no unlawful discrimination had occurred. That determination of the issue was a critical and necessary part of the decision in the prior proceeding, as it resolved an issue directly and properly before the Court which had been resolved by the lower court. There is not dispute that the Supreme Court's decision was final and valid. Finally, Plaintiff had a full and fair opportunity to

litigate the issue in the previous forum. She was represented by counsel, fully aired her version of the facts, and had an opportunity to, and in fact did, seek court review of any adverse findings. Utah Construction, 384 U.S. at 422; Moore, 480 F. Supp. At 383.

15. Although Plaintiff claims this Court should abide not by Fourth Circuit precedent in determining whether her action is barred, but instead should follow the opinion of the Supreme Court of Appeals of West Virginia in Vest v. Board of Education of the County of Nicholas, 193 W. Va. 222, 455 S.E. 2d 781 (1995), the Court rejects this position for two reasons. First, the Court finds the Vest case is factually distinguishable from the case at bar. The plaintiff in Vest had merely pursued a grievance through the West Virginia Education and Grievance Board without the assistance of counsel. Here, Plaintiff not only processed her grievance through the Grievance Board, but also had that Board's conclusions of law reviewed in a *de novo* proceeding before the Circuit Court of Barbour County, and again in a *de novo* proceeding before the Supreme Court of Appeals of West Virginia. The latter tribunal issued a lengthy decision explaining its rationale for rejecting Plaintiff's claims. Moreover, Plaintiff was represented by counsel throughout these proceedings. Second, because this Court's jurisdiction of this case is based on its alleged presentation of a federal question, Am. Compl. ¶7; *see* 28 U.S.C. § 1331, the Court must apply federal law rather than state law in resolving the issues the case presents. *See generally* Erie Railroad Co. v. Thompkins, 304 U. S. 64 (1938); Pye v. Georgia Dep't of Transportation, 513 F.2d 290, 291-92 (5th Cir. 1975).

16. For all these reasons, this Court holds that Plaintiff's claim for retaliatory discharge is barred

by the doctrine of res judicata and the doctrine of collateral estoppel, and dismisses this claim with prejudice.

17. The Board discharged Plaintiff in January, 1995 (Am. Compl. ¶6). Her allegations of sexual harassment surfaced for the first time in this lawsuit. W. Va. Code § 55-2-12 establishes a two-year limitations period for an action based on discrimination cognizable under the West Virginia Human Rights Act. McCourt v. Oneida Coal Co., 188 W. Va. 647. 425 S.E.2d 602 (W. Va. 1992). Thus, to the extent Plaintiff's sexual harassment claim relates to events which took place more than two years before filing of the Complaint, the claim is time barred.

18. Additionally, to the extent Plaintiff intended to state a sexual harassment claim under Title VII, a matter not obvious from the Amended Complaint, the claim is time barred and is additionally barred by Plaintiff's failure to exhaust administrative remedies. Discrimination claims under Title VII must ordinarily be filed with the Equal Employment Opportunity Commission within 180 days of the date on which the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1). However, if the alleged discrimination took place in a state or locality that has its own anti-discrimination laws and an agency to enforce those laws, then the time period for filing claims with the Commission is extended to 300 days. 42 U.S.C. § 2000e-5(e)(1); *see generally* Mohasco Corp. v. Silver, 447 U. S. 807 (1980). Title VII requires additionally that before the 180-day period is extended to 300 days, the person bringing the charge must initially institute proceedings with the state agency. 42 U.S.C. § 2000e-5(e)(1).

19. Because neither Plaintiff's Amended Complaint nor any other documents before this Court indicate that Plaintiff has complied with

these requirements, the Court holds that Plaintiff's sexual harassment claim is barred by the statute of limitations and by Plaintiff's failure to exhaust administrative remedies.

20. The Court understands from representations made by Plaintiff's counsel at the hearing in this matter that Plaintiff objects to the Court's dismissal of her sexual harassment claim and wishes to present evidence on this claim for the Court's consideration in the form of a Motion For Reconsideration. The Court will entertain such a motion from the Plaintiff and directs that any Motion for Reconsideration be filed no later than 30 days following May 20, 1999.

For all of these reasons, the Court **ORDERS** this case is **DISMISSED WITH PREJUDICE** and stricken from the docket.

The Clerk is directed to send a copy of this Dismissal Order to counsel.

ENTER: May 17, 1999.
s/Robert E. Maxwell
Hon. Robert E. Maxwell
Senior District Judge

APPENDIX D

Vest v Board of Education of County of Nicholas 455 S. E. 2d 781 (W.Va. 1995) 193 W. Va. 222

Barbara L. VEST, Plaintiff,

v.

The BOARD OF EDUCATION OF THE COUNTY OF NICHOLAS,

Defendant

No. 22547.

Supreme Court of Appeals of West Virginia.
Submitted Jan. 18, 1995.
Decided Feb. 17, 1995.

On certified questions from the United States District Court for the Southern District of West Virginia, the Supreme Court of Appeals, Cleckley, J., held that: (1) West Virginia Education and State Employees Grievance Board has jurisdiction to remedy discrimination that would also violate the West Virginia Human Rights Act, and (2) civil action filed under the Human Rights Act is not precluded by prior grievance decided by the Board arising out of the same facts and circumstances.

Answered and dismissed.

1. **Officers and Public Employees**
Key: 72.33(1)

Although West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, Board's authority to provide relief to employees for "discrimination,"

"favoritism," and "harassment," as those terms are defined in statute, includes jurisdiction to remedy discrimination that also would violate the Human Rights Act. Code, 5-11-1 et seq., 18-29-2.

2. Administrative Law and Procedure
Key 501

For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, prior decision must be rendered pursuant to agency's adjudicatory authority and jprocedures employed by agency must be substantially similar to those used in court; in adddition, identicality of the issues litigated is a key componment to application of administrative res judicata or collateral estoppel.

3. **Administrative Law and Procedure**
Key 501
Officers and Public Employees
Key 72.33(1)

Civil action filed under the West Virginia Human Rights Act is not precluded by prior grievance decided by the West Virginia Education and State Employees Grievance Board arising out of same facts and circumstances, as issues are not identical, and procedures employed by Board are not substantially similar to those employed by either court of law or the Human Rights Commission. Code, 5-11-1 et seq.

Syllabus by the Court

1. The West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W. VA. Code, § 5-11-1, *et seq.*; nevertheless, the Grievance Board's authority to provide relief to employees for

"discrimination," "favoritism,"and "harassment," as those terms are defined in W. Va. Code, 18-29-2 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act.

2. For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identicality of the issues litigated is a key component to the application of administrative *res judicata* or collateral estoppel.

3. A civil action filed under the West Virginia Human Rights Act, W. Va. Code 5-11-1, et seq., is not precluded by a prior grievance decided by the West Virginia Education and State Employees Grievance Board arising out of the same facts and circumstances.

Mike Kelly, Charleston, for plaintiff.

Charles R. Bailey, Belinda B. Neal, Shuman, Annand & Poe, Charleston, for defendant.

Jeffrey G. Blaydes, James M. Haviland, Crandall, Pyles & Haviland, Charleston, for amicus curiae W. Va. Educ. Ass'n.
Paul R. Sheridan, Sr. Asst. Atty. Gen., Charleston, for amicus curiae W. Va. Human Rights Com'n

CLECKLEY, Justice:

This case involves two questions certified to us by the United States District Court for the Southern District of West Virginia involving the authority

of the West Virginia Education and State Employees Grievance Board (Grievance Board) to hear a gender-based discrimination claim.

I.

FACTS

The plaintiff, Barbara L. Vest, served as a substitute teacher at Summersville Junior High School in Nicholas County. The plaintiff asserts she was terminated from that position on the basis of pregnancy and sex. The plaintiff filed a grievance against the defendant, the Board of Education of the County of Nicholas, with the Grievance Board. At a level IV grievance hearing. The plaintiff presented evidence in support of her discrimination claim. However, in her post hearing brief, the plaintiff voluntarily relinquished her claim upon her belief that it was not the proper forum to hear her discrimination claim. At the hearing, the plaintiff was not assisted by a lawyer, but was assisted by a "representative" as permitted by W. Va. Code, 18-29-3(f) (1985).[1] By decision dated May 20, 1992, the plaintiff's grievance was denied. The decision contained no conclusions of law with regard to the plaintiff' discrimination claim.[2]

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[1] W. Va. Code, 18-29-3(f), provides, in part: "An employee may have the assistance of one or more fellow employees, an employee organization representative or representatives, legal counsel or any other person in the preparation and presentation of the grievance." A "representative" is defined in W. Va. Code, 18-29-2®(1985), as "any employee organization, fellow employee, legal counsel or other person or persons designated by the grievant as the grievant's representative."

[2] The language quoted from these sections is identical to the current versions enacted in 1992. The plaintiff's claim was denied on the grounds she, *inter alia*, was not dismissed as a substitute, failed to establish her right to be retained in a specific position at the school, and failed to demonstrate she had a fundamental property or liberty interest in her substitute assignment. On May 2, 1994, the Circuit Court of Kanawha

Subsequently, on June 12, 1992, the plaintiff filed her discrimination claim with the United States Equal Employment Opportunity Commission (EEOC). According to the plaintiff, the EEOC determined there was probable cause under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and issued the plaintiff a Notice of Right to Sue on July 20, 1993. Thereafter, the plaintiff filed an action in the federal district court against the defendant under the Civil Rights Act and the West Virginia Human Rights Act, W. Va. Code, 5-11-1, *et seq.* The defendant filed a motion for summary judgment with the district court arguing the discrimination claim was barred by the doctrines of *res judicata* and collateral estoppel because of the plaintiff's previous hearing before the Grievance Board. The following questions then were certified to this Court:

1. "Does the West Virginia Education and State Employees Grievance Board ('Grievance Board') have subject matter jurisdiction over claims alleging discrimination because of gender-based discrimination?

2. "If the Grievance Board has such jurisdiction, is a civil action filed pursuant to the West Virginia Human Rights Act precluded by a prior grievance proceeding involving the same parties and arising out of the same facts and circumstances, but which did not result in any findings of fact or conclusions of law regarding the discrimination claim?"

After review, we answer the first certified question in the affirmative and the second certified question in the negative.

County affirmed the level IV decision. The plaintiff's petition for appeal filed with this Court was denied on November 29, 1994.

II.

GRIEVANCE BOARD'S SUBJECT MATTER JURISDICTION

(1) The Legislature established the grievance procedure in W. Va. Code, 18-29-1, *et seq.*, to provide the State's education employees with "a simple, expeditious and fair process for resolving (employment) problems(.)" W. Va. Code, 18—29-1 (1992); *see Triggs v. Berkeley County Bd. of Educ.*, 188 W. Va. 435, 425 S.E.2d 111 (1992); *Fayette County Bd. of Educ. V. Lilly*, 184 W. Va. 688, 403 S.E.2d 431 (1991). Under W. Va. Code, 18-29-5(a) (1989), the Grievance Board is created and is directed to employ hearing examiners to conduct and decide level IV hearings, as provided in W. Va. Code, 18-29-4 (1992). W. Va. Code, 18-29-5(b) (1989), authorizes the hearing examiners to "provide such relief as is deemed fair and equitable in accordance with the provisions of (article twenty nine.)" Grievances, according to W. Va. Code, 18-29-2(a) (1992), may include claims by employees alleging "discrimination" in the application or interpretation of written rules or procedures, "discrimination" in the "application of unwritten policies or practices of the board, (and) any specifically identified incident of harassment or favoritism(.)" W. Va. Code, 18-29-2 (19092), also defines the following terms for purposes of article twenty-nine:

"(m) 'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.
"(n) 'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.

"o) 'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

Thus, the Grievance Board, through its hearing examiners, has "jurisdiction" to decide grievances that include claims of discrimination, harassment, and favoritism which have the potential to overlap claims under the Human Rights Act. The latter prohibits discrimination in public and private employment on the basis of race, religion, color, national origin, ancestry, sex, age, blindness, or handicap. W. Va. Code, 5—11-9 (1992). The two statutes may, in a given case, provide alternative remedies to aggrieved persons. Obviously, a state educational employee who is denied a job benefit solely because of her gender would have a meritorious grievance based on either "discrimination" or "favoritism" and also would have a claim for relief under the Human Rights Act. Similarly, a victim of sexual harassment would be entitled to relief in a grievance that alleged "harassment" [3] and in a claim (administrative or judicial) under the Human Rights Act. *E.g., Westmoreland Coal Co. v.*

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[3] We are aware that the Grievance Board in *Connor v. Barbour County Board of Education*, No. 93-01-154 (1994), a decision by an administrative law judge, has stated it has no jurisdiction to entertain sexual harassment claims. *See also Norton v. West Virginia Northern Community College*, No. 89-BOR-503 (1993). As should be clear from the ensuing discussion in the text, the Connor decision is correct to the extent that it holds the Grievance Board has no authority to decide whether an employer has violated the Human Rights Act. However, harassing treatment of an employee does not fall outside of "harassment" within the meaning of *W. Va. Code 18-29-2*, simply because it is motivated by or related to the victim's sex. In a grievance under *W. Va. Code 18-29-1, et seq.*, an employee alleging harassment only needs to prove harassment. The motivation or nature of the harassment is irrelevant.

West Virginia Human Rights Comm'n, 181 W. Va. 368, 382 S.E.2d 562 (1989). These overlapping remedies lead to issues, such as are presented in this case, where we must reconcile the goals of various statutory schemes with the policies[4] supporting the doctrines of claim and issue preclusion doctrines.

Clearly, the Grievance Board's authority extends only to resolving grievances made cognizable by its authorizing legislation, that is, those grievances recognized in W.Va. Code, 18-29-2. Just as certainly, there is no authority in the statute for the Grievance Board to decide whether a person states a claim under the Human Rights Act. In fact, W. Va. Code, 5-11-10 (1994), W. Va. Code, 5-11-11 (1989), and W. Va. Code, 5-11-13 (1983), commit interpretation and enforcement of the Human Rights Act to the Human Rights Commission and to the courts of this State. *Price v. Boone County Ambulance Auth.*, 175 W. Va. 676, 337 S.E. 2d 913 (1985).

On the other hand, the Grievance Board can entertain grievances claiming that a particular employment action was the result of discrimination based on sex or any of the other prohibited motivations listed in the Human Rights Act. If a grieving employee can prevail on the

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[4] As we previously stated In *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 298, 359 S.E.2d 124, 131 (1987): "[R]es judicata [or claim preclusion] serves to advance several related policy goals—(1) to promote fairness by preventing vexatious litigation; (2) to conserve judicial resources; (3) to prevent inconsistent decisions; and (4) to promote finality by bringing litigation to an end. *E.g.*, *Pitsenbarger v. Gainer*, 175 W. Va. 31, 330 S.E.2d 840 (1985); *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983)." Collateral estoppel or issue preclusion "is supported by the same public policy considerations as res judicata." 178 W.Va. at 299, 359 S.E.2d at 132, *citing Conley*, 171 W.Va. at 588, 301 S.E.2d at 220.

claim that she has been the victim of "discrimination." "harassment," or "favoritism," it necessarily follows that the employee also can prevail by showing that the "discrimination," harassment," or "favoritism," was motivated by sexual, racial, or some other invidious ground. Conversely, an employment decision that treats an employee differently because of the employee's race or gender, etc., is, by definition, not one that is "related to the actual job responsibilities of the (employee.)" W.Va. Code, 18-29-2(m).

For example, as a practical matter, a grievant who has persuasive evidence that sexual or racial bias entered into an employment decision may want to present such evidence at a grievance hearing both to prove "discrimination" and to rebut the employer's neutral or job-related explanation for its action. To hold that a grievant could not present evidence of an illicit motive to help prove "discrimination" just because such motive also is prohibited by the Human Rights Act would be both unfair to the grievant and inefficient for our administrative and judicial systems. It would be unfair to the grievant because it artificially would limit probative evidence relevant to discrimination. It would be inefficient because a grievance decision in favor of the grievant may, in many cases, end the controversy and preclude the need for further administrative or judicial proceedings under the Human Rights Act; and, it does so by a procedure that is much faster and less expensive.

Thus, the answer to the District Court's first certified question is in the affirmative. The Grievance Board does not have authority to determine liability under the Human Rights Act, W. Va. Code, 5-11-1, *et seq.*; nevertheless, the Grievance Board's authority to provide relief to employees for "discrimination," "favoritism," and "harassment," as those terms are defined in W.Va

Code, 18-29-2 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over gender-based discrimination claims—just as it has subject matter jurisdiction over any claim of discrimination, meaning employment decisions that are not based on job-related reasons or agreed to in writing by the employees. "Discrimination," "favoritism," and "harassment" in W. Va. Code, 18-29-2, comprise, *inter alia*, employment discrimination that also is prohibited by the Human Rights Act. Accordingly, we must proceed to answer the District Court's second certified question.

III.

(2) We have held that for preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is not statutory authority directing otherwise, [5] the prior "decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court(.)" *Liller v. West Virginia Human Rights Comm'n*, 180 W. Va. 433, 440, 376 S.E.2d 639, 646 (1988). In addition, "(t)he identicality of issues litigated is a key component to the application of administrative res judicata or collateral estoppel(.)" 180 W. Va. At 440, 376 S.E.2d at 646. Using that analysis, we find no preclusive effects to the Grievance Board's determinations over human rights claims.

[5] Nothing in either of the relevant statutes, W. Va. Code 5-11-1, *et seq.*, and W. Va. Code, 18-29-1, *et seq.*, expressly resolves the preclusion issues presented by the District Court's second certified question.

(3) First, there are not identical issues. As we stated above, a "discrimination" claim under W. Va. Code, 18-29-2(m), only need establish that the adverse employment decision was neither job related nor agreed to by the employees. Section 2(m) imposes no requirement for proving that the "discrimination" was caused by an illicit motive or was the result of a discriminatory policy having a disparate impact, [6] as would be the case under the Human Rights Act. *E.g., University of West Virginia v. Decker*, 191 W. Va. 567, 447 S.E.2d 259 (1994). Thus, claim preclusion would apply only if we were to hold that subsequent litigation by grievants of claims arising out of the same facts as their grievances is barred not only as to arguments actually litigated, but also as to those that could have been litigated in the grievance. *See* Syl. pt.2, *Conley v. Spiller*, 171 W. Va. 584, 301 S.E.2d 216 (1983); *Lane v. Williams* 150 W. Va. 96, 100, 144 S.E.2d 234, 236 (1965). As we did in *Liller*, [7] *supra*, we refuse to impose such a bar on subsequent litigation under the Human Rights Act. Employees appearing before the Grievance Board may have legitimate reasons for not raising the more difficult and far more contentious issue of discriminatory motive, and because many grievants lack the assistance of a lawyer, they may not even recognize the potential for a human rights claim. By not imposing a collateral bar, we reinforce the Legislature's purpose in enacting W. Va. Code, 18-29-1, *et seq.*, of creating a simple and expeditious procedure for resolving employees' grievances.

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[6] It is by no means certain that a disparate impact claim would be cognizable before the Grievance Board. Given our disposition of the certified questions presented and the fact this case did not involve such a claim, we need not address the issue here.

[7] *Liller* involved the question whether a Deputy Sheriffs' Civil Service Commission's decision regarding a discharge precluded a subsequent human rights action concerning the same facts. We held that, because the civil service commission had not ruled on the employee's

The second reason that causes us to reject claim preclusion also persuades us that issue preclusion should not apply. The procedures employed by the Grievance Board are not substantially similar to those employed by either a court of law or the Human Rights Commission and the differences are of profound significance. Thus, even if a grievance hearing examiner concludes that an employer's adverse action to a grievant was not "discriminatory," but was job related, that determination is not binding on a court or the Commission deciding a claim under the Human Rights Act—regardless of whether the grievant alleged or adduced evidence of discriminatory motive or disparate impact at the grievance hearing and regardless of whether the Grievance Board made a determination about such issues.

As noted above, the Legislature designed the grievance process to be simple and expeditious. Consequently, the process is streamlined and lacks many of the adversarial accoutrements found in judicial and Commission's proceedings. In the vast majority of grievances, for example, the grievant is not represented by a lawyer. Moreover, and more importantly, the grievance process does not provide for any of the discovery mechanisms available under the Rules of Civil Procedure and the Commission's procedural rules. [8] Finally, in stark contrast to the Human Rights Act, the grievance statute does not provide for the right to an independent investigation of each grievance

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[8] We note that in *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 300, 359 S.E.2d 124, 133 (1987), where we accorded preclusive effect to the decisions of the court of claims, we emphasized that the court of claims maintains procedural and discovery rules similar to those that govern our courts.

filed before the Board, [9] does not make available at public expense representation by a lawyer for cases that proceed to a hearing before an administrative law judge, [10] and does not give employees the option of skipping the administrative process and pursuing their claims *de novo* in circuit court where jury trials and the full array of legal and equitable remedies are obtainable.[11]

The issues in a human rights case—especially unlawful motive and disparate impact—are extremely difficult and often complex. Invariably, they require substantial degrees of fact gathering and familiarity with the concepts of discrimination law. A grievant without a lawyer could not possibly be expected to grasp the significance of that law, put together a case of discrimination, and comprehend the full impact of claim and issue preclusion doctrines. A grievant with a lawyer would have an unfairly difficult task trying to prove illicit motive or disparate impact without access to the full panoply of discovery opportunities. The problem especially is apparent by the fact that in matters of motive and disparate impact the employer ordinarily possesses the crucial evidence. Thus, in the language of Syllabus Point 3, in part, of *Mellon-Stuart Co. v. Hall*, 178 W.Va. 291, 359 S.E.2d 124

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[9] W.Va. Code, 5-11-10 (1994), directs the Commission to investigate all claims filed with it. *See Allen v. State Human Rights Commission*, 174 W.Va. 139, 324 S.E.2d 99 (1984).

[10] By virtue of W. Va. Code, 5-11-7 (1967), the State prosecutes all claims in which probable cause is found and in which the complainant is not represented by private counsel, and the Attorney General has a mandatory duty to furnish all legal services required by the Commission. *Allen, supra.*

[11] *See* W. Va. Code, 5-11-13 (1983); *Price v. Boone County Ambulance Auth.., supra.* Jury trials, of course, are not available in the administrative process; and, because of that fact, a complainant's recovery before the Commission is limited to equitable relief and may not include large awards for emotional distress or punitive damages. *Bishop Coal Co. v. Salyers*, 181 W.Va. 71, 380 S.E.2d 238 (1989).

(1987), the plaintiff in this case was not "afforded a full and fair opportunity to litigate the matters in dispute(.)"

We stated in *Liller*, 180 W.Va. at 441, 376 S.E.2d at 647, "that where separate legislative enactment's exist which provide separate administrative remedies, preclusive doctrines will not necessarily be applied. *See Collins v. Elkay Mining Co.*, 179 W. Va. 549, 371 S.E.2d 46 (1988); *Davis v. Kitt Energy Corp.*, 179 W.Va. 37, 365 S.E.2d 82 (1987); *Wiggins v. Eastern Associated Coal Corp.*, 178 W.Va. 63, 357 S.E.2d 745 (1987)." Indeed, our cases require us to determine "whether applying the doctrines (of preclusion) is consistent with the express or implied policy in the legislation which created the body." Syllabus Point 3, in part, *Mellon-Stuart Co., supra.* In this case, we have W. Va. Code, 18-29-1, *et seq.*, a legislatively provided administrative remedy for state employees that is designed to assure them of a fast, easy-to-use and inexpensive procedure for resolving the entire spectrum of legitimate employee complaints. We also have in the Human Rights Act a complex array of procedures and protections designed to give effect to the "civil right of all persons" to equal employment opportunity and to end the invidious discrimination that "is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." W. Va. Code, 5-11-2 (1989). We think our answers to the certified questions best accommodate the different legislative goals that support the two statutes involved in this case.[12]

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[12] We note that the United States Supreme Court has reached similar conclusions in order to give full effect to Congress's purposes in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq. E.g., University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) (A judicially unreviewed state administrative decision on a claim of race discrimination does not bar subsequent Title VII litigation of the same claim); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974)(a grievance decision applying an anti-discrimination provision in a collective

In so holding, we particularly remain mindful of the primacy that the Legislature has accorded to eliminating invidious discrimination in this State. As we stated in *Allen v. State Human Rights Commission*, 174 W.Va. 139, 149, 324 S.E.2d 99, 109 (1984), "(e)qual opportunity in this State is a fundamental principle" grounded in several provisions of our State Bill of Rights. "(E)very act of unlawful discrimination in employment...is akin to an act of treason, undermining the very foundations of our democracy." 174 W.Va. at 148, 324 S.E.2d at 108. The sense of betrayal is even greater when the discriminator is, as alleged in this case, a public servant. We cannot allow the substantial protections promised by the Human Rights Act from such assaults on our personal and institutional integrities to be compromised by unthinking adherence to technical doctrines. If we permit public employers to use prior decisions rendered by a loose administrative apparatus—engaged in by unwary and often uncounseled employees and lacking important procedural rudiments—to preclude victims of discrimination from subsequently invoking the promises made by the Human Rights Act, we, thereby, would add our own breach of trust to those already committed by public discriminators. Thus, we refuse to so hold.[13]

We, therefore find it unnecessary to resolve the dispute between the parties in the present case as

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bargaining agreement does not preclude subsequent Title VII litigation on the same set of facts).

[13] Our statements in the text, of course, should not be construed to express any opinion on the merits of the plaintiff's charges of discrimination in this case. Rather, we merely hold that the Human Rights Act entitles her to a full and complete opportunity to prove those allegations before the Commission or a trial court.

to whether the plaintiff "actually litigated" her discrimination claim before the Grievance Board.[14]

Accordingly our response to the District Court's second certified question is negative. A civil action filed under the Human Rights Act is not precluded by a prior grievance decided by the Grievance Board arising out of the same facts and circumstances. The grievance procedures and the Human Rights Act provide enforcement mechanisms to accomplish different legislative purposes and neither preempts the other.[15]

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[14] As noted above, at the level IV grievance hearing the plaintiff presented evidence on discrimination, but then "relinquished" the claim in her post-hearing brief before the issue was decided. *Liller* would seem to dictate a finding that the Grievance Board's decision, therefore, would not preclude a subsequent Human Rights Act complaint. The issue in *Liller* was whether a decision of a civil service commission should be given preclusive effect. We concluded that "where the issue of sex discrimination *has not been decided* by a deputy sheriff civil service commission, the involved deputy is not foreclosed from filing a complaint with the human rights

[15] We emphasize, however, that employees can recover only once for each injury. Thus, for example, if the Grievance Board awards back pay to a discharged employee who later, based on the same set of facts, prevails on a Human Rights claim, the grievance award would be set off against the employee's recovery under the Human Rights Act.

IV

CONCLUSION

For the foregoing reasons, we find the West Virginia Education and State Employees Grievance Board has subject matter jurisdiction over any claim of discrimination, and a civil action filed under the Human Rights Act is not precluded by such a prior grievance which involves the same facts and circumstances. The certified questions answered, this case is dismissed.

Answered and dismissed.
BROTHERTON, J., did not participate.
FOX, J., sitting by temporary assignment.